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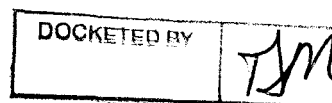


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ARIZONA CORPORATE COMMISSION
DOCKET CONTROL



IN THE MATTER OF THE APPLICATION
OF DII-EMERALD SPRINGS, L.L.C. FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE WASTEWATER
SERVICES.

DOCKET NO. WS-20794A-11-0140

IN THE MATTER OF THE APPLICATION
OF DII-EMERALD SPRINGS, L.L.C. FOR
APPROVAL OF RATES.

DOCKET NO. WS-20794A-11-0279

IN THE MATTER OF THE APPLICATION
OF DOYLE THOMPSON FOR APPROVAL
OF A CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE SEWER
SERVICES.

DOCKET NO. SW-20851A-12-0226

PROCEDURAL ORDER

BY THE COMMISSION:

On April 4 and July 15, 2011, DII-Emerald Springs, L.L.C. ("DII") filed an application for a Certificate of Convenience and Necessity ("CC&N") to provide wastewater service, in Docket No. WS-20794A-11-0140 ("CC&N Docket"), and an application for ratemaking, in Docket No. WS-20794A-11-0279 ("Rate Docket") (collectively "DII Dockets"). The Commission's Utilities Division ("Staff") found DII's applications to be sufficient in August 2011, and the two dockets were consolidated through a Procedural Order issued on September 15, 2011. The time clock for these consolidated dockets was suspended indefinitely by a Procedural Order issued on November 21, 2011. Since that time, the matter has been scheduled and rescheduled for hearing, public comment sessions and procedural conferences have been held, and intervention has been granted to the Emerald Springs Homeowners' Association ("HOA"), to Robhana, Inc. and Charles Dunn Capital, Inc. ("Robhana"),¹ and to Doyle Thompson.² In addition, the HOA has disconnected from DII's

¹ Robhana's intervention was granted during the procedural conference on March 20, 2012. Robhana asserts that it owns the land on which DII's sewer plant sits.

² Mr. Thompson requested and was granted intervention at a procedural conference held on April 10, 2012, at which all parties appeared.

1 wastewater treatment plant ("WWTP") and connected to Mr. Thompson's WWTP for what has been
2 described by the HOA as a test period, although the HOA has expressed an intention not to terminate
3 the test period.

4 On April 11, 2012, a Procedural Order was issued in the DII Dockets requiring Mr.
5 Thompson to file, by May 10, 2012, a document notifying the Commission of his plans to apply/not
6 to apply to the Commission for CC&N authority and rates or the status of any such application
7 already filed with the Commission by him. The Procedural Order further required each party to the
8 DII Dockets to file, by June 11, 2012, a document providing the Commission an update of the party's
9 position in the DII Dockets and how the matters should go forward, including the party's position on
10 consolidating the DII Dockets with the Docket for any application/s filed by Mr. Thompson.

11 On May 29, 2012, in the DII Dockets, Mr. Thompson filed a document stating that he had not
12 yet filed an application, but still intended to do so as soon as possible.

13 On June 7, 2012, in Docket No. SW-20851A-12-0226 ("Thompson Docket"), Mr. Thompson
14 filed an application for a CC&N to provide wastewater service to the area including the HOA and its
15 members. Mr. Thompson's CC&N application has not yet been found sufficient.

16 On June 11, 2012, DII, the HOA, Robhana, and Staff each filed a response to the Procedural
17 Order. DII stated that Mr. Thompson's intervention should be terminated because Mr. Thompson
18 failed to comply with the Procedural Order of April 11, 2012; that DII believes Mr. Thompson will
19 not be able to comply with Arizona Department of Environmental Quality ("ADEQ") requirements
20 and that Mr. Thompson was already in violation of his ADEQ general permit; that Robhana is willing
21 to issue DII a lease agreement if DII obtains a CC&N for the area; that DII also discussed with
22 Robhana the possibility of a third party company's taking over DII's WWTP; and that DII requested
23 for the case to move forward to decision. The HOA stated that it opposes DII's applications, that it
24 supports any application filed by Mr. Thompson, and that it intended to file a motion to dismiss DII's
25 applications. The HOA also stated that if the Commission does not dismiss DII's applications, the
26 HOA supports consolidation of the DII Dockets and the Thompson Docket. Robhana stated that its
27 central concern is the assurance of a competent entity to provide safe, reliable, and affordable
28 wastewater service to the Emerald Springs development; described issues related to the provision of

1 such service by either DII or Mr. Thompson; expressed no apparent preference for either DII or Mr.
2 Thompson; and stated that the docket for any CC&N application filed by Mr. Thompson should be
3 consolidated with the DII Dockets and that Staff should then create a Staff Report comparing the two
4 competing applications and evaluating the likelihood that additional plant and permits will be
5 necessary from each applicant. Staff stated that DII's applications are now irrelevant because DII is
6 no longer providing utility service to any customer and has no request for service from the only
7 customer in the subject service area, that consolidation of the DII Dockets with Mr. Thompson's
8 docket is neither appropriate nor necessary, and that the Administrative Law Judge ("ALJ") may wish
9 to consider administrative closure of the DII Dockets.

10 On July 11, 2012, the HOA filed a Motion to Dismiss for Lack of Jurisdiction ("HOA
11 Motion"), asserting that the Commission lacks jurisdiction to rule upon DII's CC&N and rate
12 application because DII is not a public service corporation. The HOA argued that because DII is not
13 currently furnishing sewer services for profit to any customer and has no prospects to do so (as the
14 HOA does not intend to reconnect to DII's WWTP), DII is not a public service corporation, and the
15 Commission lacks jurisdiction to rule on DII's CC&N and rate applications and must instead dismiss
16 them.

17 On July 20, 2012, Staff filed a Response to the HOA Motion, asserting that the Commission
18 has subject matter jurisdiction over CC&N applications to provide sewer service and over
19 applications to establish rates and charges for sewer service; that the Commission has personal
20 jurisdiction over DII, as an applicant, irrespective of whether DII is currently a public service
21 corporation; and that the issue of whether DII is a public service corporation should not be summarily
22 resolved through ruling on the HOA Motion. Staff also asserted, however, that the ALJ should
23 consider administratively closing the DII Dockets because the only customer in DII's contemplated
24 service area is currently being served by another sewer provider. Staff pointed out that the
25 Commission's rules contemplate that CC&N applications will be filed by entities not currently
26 engaged in furnishing utility service and thus not yet public service corporations.

27 On July 25, 2012, DII filed a Response to the HOA Motion, asserting that DII and the HOA
28 still have a contract for DII to provide the HOA sewer services, that some of the assertions made by

1 the HOA in the HOA Motion are factually inaccurate, that DII will be able to obtain the approvals
2 necessary to serve as the sewer provider in the requested CC&N service area, that DII's CC&N
3 application and Mr. Thompson's CC&N application should be compared, that Mr. Thompson should
4 be ordered to install flow meters on his system, that the DII and Thompson applications should move
5 forward, and that the HOA Motion should be invalidated and terminated. Robhana has not filed a
6 response to the HOA Motion.

7 DII and Mr. Thompson now have competing applications for CC&N authority to provide
8 wastewater service to the service area that currently includes as customers/potential customers only
9 the HOA and its members. DII also has a pending rate application.

10 The HOA Motion would have the Commission summarily dispose of both of DII's
11 applications, without providing DII an opportunity to show that granting it a CC&N would be in the
12 public interest. The HOA's reasoning, effectively, is that because DII no longer has any sewer
13 customers (which is due to the HOA's unilateral action), and currently has no prospective sewer
14 customers (due to the HOA's planned actions), DII should not be permitted to pursue its pending
15 applications before the Commission. Indeed, the HOA goes so far as to argue that the Commission
16 lacks jurisdiction to allow DII to do so. The HOA's position cannot withstand scrutiny.

17 The Commission has exclusive and plenary jurisdiction, granted by Article 15, § 3 of the
18 Arizona Constitution, to establish public service corporation rates and charges. Thus, of necessity,
19 the Commission has exclusive jurisdiction over applications for the establishment of those rates and
20 charges. At the time DII's rate application was filed, DII was engaged in the provision of sewer
21 services for profit. Although DII's rate application was not necessary, strictly speaking, as DII's
22 initial authorized rates could and would be established through its CC&N application under normal
23 circumstances, neither this fact nor DII's subsequent loss of its customer/s results in the
24 Commission's lacking jurisdiction over DII's rate application.³

25 Likewise, the Commission has jurisdiction, provided by the Arizona Legislature, to grant
26 CC&Ns to operate as public service corporations. Thus, again of necessity, the Commission has
27

28 ³ If DII were to withdraw its rate application, its CC&N application would remain pending.

1 jurisdiction over applications for such CC&Ns. That applicants for CC&Ns would not yet be
2 operating as public service corporations was not only contemplated by the Legislature, but was
3 dictated by the Legislature, as A.R.S. § 40-281 expressly prohibits a public service corporation
4 (which in this context must include an applicant to become a public service corporation) from
5 constructing any plant or exercising any rights or privileges under a franchise or permit without first
6 having obtained a CC&N from the Commission. Any construction of the applicable laws to mean
7 that the Commission lacks the jurisdiction to rule upon an application for a CC&N because the
8 applicant is not yet operating as a public service corporation would lead to an absurd result. Such a
9 construction would mean that a true start-up entity could never obtain a CC&N and, in the present
10 context, would effectively allow the HOA to usurp the Commission's authority to determine which of
11 two competing entities would provide service best satisfying the public interest and should be granted
12 a CC&N. The HOA's Motion to Dismiss will be denied.

13 When the Commission is presented with competing applications for a CC&N, the most
14 appropriate course of action is for the Commission to consider the competing applications in one
15 proceeding, compare the qualifications of the two applicants, determine which applicant's services
16 will best satisfy the public interest, and grant the CC&N to that applicant. (*See Arizona Water Co. v.*
17 *Arizona Corp. Comm'n*, 217 Ariz. 652 (Ariz. App. 2008).) The fact that one of the applicants is
18 currently providing utility services and one is not does not dispose of the Commission's duty to
19 determine which applicant's services will best satisfy the public interest. (*See id.*) The DII Dockets
20 and the Thompson Docket will be consolidated.

21 As a Letter of Sufficiency has not yet been issued by Staff in the Thompson Docket, the
22 Commission is not yet in a position to establish a procedural schedule for these consolidated dockets.
23 A procedural schedule, which shall include an evidentiary hearing, will be established once Mr.
24 Thompson's CC&N application has been found sufficient.

25 IT IS THEREFORE ORDERED that **the HOA Motion to Dismiss is Denied.**

26 IT IS FURTHER ORDERED that **Docket No. WS-20794A-11-0140, Docket No. WS-**
27 **20794A-11-0279, and Docket No. SW-20851A-12-0226 are hereby consolidated.**

28 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized

Communications) applies to this proceeding and shall remain in effect until the Commission's Decision in this matter is final and non-appealable.

IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 31st day of July, 2012.


SARAH N. HARPRING
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered this 31st day of July 2012, to:

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